United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

aped

76-7575

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

GETTY OIL COMPANY (EASTERN OPERATIONS), INC.,
Plaintiff-Appellant-Cross-Appellee,

—against—

SS PONCE DE LEON, her engines, tackle, etc., SUN LEASING CO., and TRANSAMERICAN TRAILER TRANSPORT, INC.,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT AND CROSS-APPELLEE GETTY OIL COMPANY (EASTERN OPERATIONS), INC.

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiff-Appellant-Cross-Appellee Getty Oil Company (Eastern Operations), Inc.
120 Broadway
New York, New York 10005

LAWRENCE J. BOWLES
RICHARD H. BROWN, JR.
Of Counsel

TABLE OF CONTENTS

	PAGE
Statement of Issues Presented for Review.....	1
A. This Appeal.....	1
B. The Issues Presented for Review	2
Statement of the Case	6
The nature of the case, proceedings and disposition in the court below	6
Statement of Facts Relevant to the Issues	7
The Vessels	7
Weather and sea conditions at the time of collision	8
The WILMINGTON GETTY's arrival in port and choice of anchorage area	8
The PONCE DE LEON's navigation	10
The WILMINGTON GETTY's timely and specific radio warning to the PONCE DE LEON	11
The PONCE DE LEON's unfulfilled assurance that she saw the WILMINGTON GETTY and would keep clear.....	12
The collision	13
Comment on the lack of credibility of the PONCE DE LEON's master	14
ARGUMENT	15
The District Court's Clearly Erroneous Findings of Fact	15
A. The WILMINGTON GETTY's location at anchor was not "hazardous" or "dangerous" to any ship that was herself complying with the rules for proper navigation in fog. The WILMINGTON GETTY was approximately 375 yards outside of Ambrose Channel and numerous ships had safely	

PAGE

passed her 15

B. The WILMINGTON GETTY's precautions were proper for the circumstances and protected her from all ships other than the grossly negligent PONCE DE LEON 16

C. The District Court clearly erred in failing to find that the WILMINGTON GETTY's specific radio warning to the PONCE DE LEON was timely and that, if the PONCE DE LEON had acted properly, the warning was sufficient for the PONCE DE LEON alone to have avoided the collision 18

D. The District Court clearly erred in failing to find that after the radio communications there was no time to make and analyze an accurate radar plot and to take effective action to move the WILMINGTON GETTY 20

E. The District Court clearly erred in failing to find that the PONCE DE LEON sighted the WILMINGTON GETTY at a distance of 2 miles at least 10 minutes before collision and five minutes before the PONCE DE LEON turned out of the channel towards the WILMINGTON GETTY ... 24

FIRST POINT -

The many gross faults of the PONCE DE LEON fully account for the collision, and she should have been condemned in sole fault.

In addition to her adjudicated faults of excessive speed, failure to stop and make a radar plot, and failure to stop her engines on hearing the WILMINGTON GETTY's fog signals, the PONCE DE LEON caused the collision (a) by blindly turning out of the channel toward the WILMINGTON GETTY, creating a hazardous close quarters situation where none had existed before, and (b) by failing to make proper use of her two radars to avoid collision after timely warning by the WILMINGTON GETTY and after assuring the WILMINGTON GETTY that she had seen her and would pass clear..... 27

PAGE

A. The District Court erred as a matter of law in failing to condemn the PONCE DE LEON in fault for blindly turning out of the channel, creating a hazardous close quarters situation where none existed before 27

B. The District Court erred as a matter of law in failing to condemn the PONCE DE LEON in fault for failing to make proper use of her two radars to avoid collision, after turning out of the channel, after a timely warning from the WILMINGTON GETTY, and after the PONCE DE LEON had assured the WILMINGTON GETTY that she had seen her and would keep clear 31

SECOND POINT -

The WILMINGTON GETTY did not cause or contribute to the collision - she should have been exonerated from all liability.

The District Court's criticisms of the WILMINGTON GETTY were based on clearly erroneous findings of fact and on misconceptions of the applicable law which would impose on the WILMINGTON GETTY a higher standard of care than reasonable prudence - in effect requiring her to anticipate and overcome the consequences of the PONCE DE LEON's incomprehensible and gross negligence, despite the PONCE DE LEON's assurance that she would keep clear 33

A. Considering the other safety measures adopted by the WILMINGTON GETTY as a matter of foresight, the District Court erred as a matter of law in holding the WILMINGTON GETTY contributorily negligent for failing (1) to issue "additional" security calls, (2) to keep her engines on "Standby", and (3) to "let go the anchor chain after observing the PONCE DE LEON on radar." In so doing the court in effect required the WILMINGTON GETTY to anticipate the PONCE DE LEON's incomprehensible and gross negligence 35

PAGE

1. The WILMINGTON GETTY had no duty to issue additional security calls after anchoring and, in any event, their omission did not contribute to collision 36

2. The WILMINGTON GETTY had no duty to keep her engines on immediate standby .. 38

3. The WILMINGTON GETTY had no duty to let go her anchor after observing the PONCE DE LEON on radar 39

4. The WILMINGTON GETTY had no duty to anticipate the PONCE DE LEON's gross negligence 41

B. The District Court also erred as a matter of law in holding the WILMINGTON GETTY negligent for failing to make a radar plot of the PONCE DE LEON under curcumstances in which there was no time to plot due to the PONCE DE LEON's excessive speed and it was impossible to make an accurate and useful plot because of the PONCE DE LEON's continually changing course and speed 44

C. The District Court mistakenly concluded that the holding in U.S.A. v. Reliable Transfer, Inc., 421 U.S. 397 (1975), required it to disregard the doctrine earlier laid down by the Supreme Court that where fault of one vessel suffices to account for a collision, any reasonable doubt as to the conduct of the other should be resolved in her favor. As a consequence it wrongly condemned the WILMINGTON GETTY for what at most could be merely doubts as to her conduct 46

THIRD POINT -

Alternatively, if there was any fault on the WILMINGTON GETTY's part, which is denied, the District Court erred as a matter of law in imposing as much as 20% of the blame on her and only 80% of the blame on the PONCE DE LEON 52

PAGE

CONCLUSION -

The judgment of the District Court should be reversed and the PONCE DE LEON and Sun/TTT adjudged solely liable for the collision and resulting damages. Alternatively, if there was any causative fault on the WILMINGTON GETTY's part (which is denied), the proportion of liability assessed against the WILMINGTON GETTY should be modified so as not to exceed five per cent. The cross-appeal should be dismissed 56

TABLE OF AUTHORITIES

Cases:

Afran Transport Co. v. The Bergechief, 274 F.2d 469 (2 Cir. 1960) 45

The Bright, 38 F. Supp. 574 (D. Md. 1941)..... 31, 43

The Ceylon Maru, 266 F. 396 (D. Md. 1920)..... 43

The Charles Hubbard, 229 F. 352 (6 Cir. 1916)..... 38, 43

The City of New York, 147 U.S. 72 (1893) 50, 51

The "Esso Brussels", [1972], 1 Lloyd's Rep. 286, rev'd [1973], 2 Lloyd's Rep. 73 (Court of Appeal). 53, 56

The Great Republic, 90 U.S. (23 Wall.) 20 (1875).... 48, 49

Labrador S.S. Co. v. M/V Egle, 1971 A.M.C. 2344 (N.D. Ohio 1971) 54

Long Island Railroad Co. v. Killien, 67 F. 365 (2 Cir. 1895) 43

The Lord O'Neill, 66 F. 77 (4 Cir. 1895) 48

Mamiye v. Barber S.S. Lines, Inc., 360 F.2d 774 (2 Cir. 1966) 52

McAllister v United States, 348 U.S. 19, 20 (1954) ... 15

The Oregon, 158 U.S. 186 (1894)..... 42, 43, 51

PAGE

Ove Skou Rederi A/S v. Nippon Yusen Kaisha, Ltd., 1971 A.M.C. 470 (S. Ct. of Canada 1970)..... 30

Partenreederei Wallschiff v. The Pioneer, 164 F. Supp. 421, aff'd. 287 F.2d 886 (6 Cir. 1961).... 54, 55

The "Salaverry", [1968], 1 Lloyd's Rep. 53 53

The S.S. Randa, 56 F. Supp. 508 (S.D.N.Y. 1944)..... 30, 43

The "Statue of Liberty", [1971], 2 Lloyd's Law Rep. 277 (House of Lords) 53

Sun Oil Company v. S.S. Georgel, 245 F. Supp. 537 (S.D.N.Y. 1965) 40

Theothilatos v. Martin Marine Transp. Co., 127 F.2d 1016 (4 Cir. 1942)..... 48

Tug Julia C. Moran v. U.S.N.S Comet, 1967 A.M.C. 1348 28

Union Oil Company of California v. The Tugboat San Jacinto, 409 U.S. 140 (1972) 43, 56

U.S.A. v. Reliable Transfer, Inc., 421 U.S. 397 (1975) 46, 47

The Verena, [1961], 2 Lloyd's List Law Reports 127 .. 30, 54

Victorias Milling Co. v. The SS Gulfport, 166 F. Supp. 396 (S.D.N.Y. 1958) 34, 55

Villain & Fassio E Compagnia v. Tank Steamer E. W. Sinclair, 207 F. Supp. 700 (S.D.N.Y. 1962), aff'd 313 F.2d 722 (2 Cir. 1963) 28, 55

Wells v. Armstrong, 29 F. 216 (S.D.N.Y. 1886)..... 40

Statutes:

U. S. Inland Rules:

33 U.S.C. § 151 et seq. 28

33 U.S.C. § 221, Article 29..... 29, 31, 32

PAGE

International Rules:

33 U.S.C. § 1051 et seq. 28

33 U.S.C. § 1061 29

33 U.S.C. § 1077(c), Rule 16(c)..... 29

33 U.S.C. § 1092 29

33 U.S.C. § 1094, The Radar Annex 29, 31

Regulations:

Vessel Bridge to Bridge Radio Telephone Regulations:

33 C.F.R. § 26.01 et seq. 33

33 C.F.R. § 26.04(b) 35

Federal Rules of Civil Procedure:

Rule 52(a) 52

Texts:

Griffin, The American Law of Collision (1949).... 37, 48, 49

Other Authorities:

Healy, Radar and the New Collision Regulations, 37 Tulane Law Review 621 (1963) 45

Meadows, Radar Annex and Rule 16, 5 Willamette Law Journal 399 (1969) 30

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7575

GETTY OIL COMPANY (Eastern Operations), INC.,
Plaintiff-Appellant-Cross Appellee,

- against -

SS PONCE DE LEON, her engines, tackle, etc.
SUN LEASING CO., and TRANSAMERICAN
TRAILER TRANSPORT, INC.
Defendants-Appellees-Cross Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT AND CROSS APPELLEE GETTY OIL COMPANY (EASTERN OPERATIONS), INC.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. This Appeal

This case concerns a collision in New York Harbor, on May 10, 1973, which occurred during dense fog when the inbound steamship PONCE DE LEON turned out of Ambrose Channel and struck the anchored steamship WILMINGTON GETTY. Despite the facts that: (a) the PONCE DE LEON timely saw the WILMINGTON GETTY by radar at

a distance of two miles and knew the WILMINGTON GETTY's location outside of the channel, (b) the WILMINGTON GETTY timely warned the PONCE DE LEON by radio that she was lying at anchor, and (c) the PONCE DE LEON assured the WILMINGTON GETTY by radio that she had seen her and would keep clear, the PONCE DE LEON through grossly excessive speed (12 knots in dense fog) and grossly negligent inattention to her radar struck the anchored and motionless WILMINGTON GETTY's bow, causing damage to both ships.

Getty Oil Company (Eastern Operations), Inc. (hereinafter Getty Oil) appeals from the final judgment entered in the Southern District of New York on October 22, 1976 holding the PONCE DE LEON only 80% at fault for the collision and holding the WILMINGTON GETTY 20% at fault. Getty Oil contends that the PONCE DE LEON, owned by appellees Sun Leasing Company and Transamerican Trailer Transport, Inc. (hereinafter Sun/TTT), should have been found in sole fault. Alternatively, if there was any fault on the WILMINGTON GETTY's part, which is denied, the PONCE DE LEON should be held much more than 80% to blame and the WILMINGTON GETTY much less than 20% to blame.

B. The Issues Presented for Review

1. Although the District Court properly held the PONCE DE LEON negligent for excessive speed, failure to stop and make a radar plot of the WILMINGTON GETTY, and failure to stop engines upon hearing the WILMINGTON GETTY's fog signals, the District

Court erred as a matter of law in not also holding the PONCE DE LEON negligent for:

(a) blindly turning out of the channel and proceeding toward the WILMINGTON GETTY at high speed, thereby creating a hazardous close quarters situation where none had existed before; and

(b) failing to make proper use of her two radars to avoid the WILMINGTON GETTY after assuring the anchored WILMINGTON GETTY that she had seen her and would pass clear.

2. The District Court erred as a matter of law in holding that the WILMINGTON GETTY contributed to the collision by the following acts:

(a) failure to issue additional security calls after anchoring;

(b) failure to keep her engines on standby while anchored in a hazardous locale;

(c) failure to make a radar plot; and

(d) failure to let go the anchor chain after observing the PONCE DE LEON on radar.

As will be demonstrated in this appeal, the above alleged faults of the WILMINGTON GETTY are based on incomplete and clearly erroneous findings of fact, on an unusual measure of hindsight, and on a misconception of the applicable law, under which, in

effect, the WILMINGTON GETTY was held to so unreasonably high a standard that she was obligated to anticipate and overcome the consequences of the PONCE DE LEON's unforeseeable gross negligence.

3. The District Court clearly erred as a matter of fact:

(a) in failing to find, on uncontradicted evidence, that the PONCE DE LEON sighted the anchored WILMINGTON GETTY by radar at least 10 minutes before collision, and at least 5 minutes before she turned out of the channel - the PONCE DE LEON clearly having ample time to determine what the WILMINGTON GETTY was doing and keep well clear;

(b) in failing to find, on uncontradicted evidence, that the PONCE DE LEON, after receiving specific warning that the WILMINGTON GETTY was anchored, had ample time and space to avoid collision - if she had made proper use of her two radars;

(c) in failing to find, on uncontradicted evidence, that the WILMINGTON GETTY was 375 yards outside of Ambrose Channel and that numerous vessels had safely passed her without the need for additional general security calls from the WILMINGTON GETTY;

(d) in finding that the WILMINGTON GETTY's anchored position was hazardous (there was no hazard to any vessel except the PONCE DE LEON - and hazard arose only because the PONCE DE LEON negligently turned out of the channel and

proceeded too close to the WILMINGTON GETTY, unnecessarily creating hazard where none existed before);

(e) in failing to find that the WILMINGTON GETTY's precautions of monitoring her radar and radio and giving timely and specific warning to any vessel approaching her were reasonably adequate for the circumstances and sufficient to protect her and all vessels complying with the navigation rules and making proper use of their radars and radios; and

(f) in failing to find that, after the WILMINGTON GETTY had specifically warned the PONCE DE LEON that she was anchored and had been assured that the PONCE DE LEON would keep clear, there was not sufficient time (because of the PONCE DE LEON's high speed) for the WILMINGTON GETTY to both make and analyze a radar plot and also take action (by using her engines or letting go her anchor) to avoid collision and, in any event, no forecast from a radar plot could be accurate under the circumstances because the PONCE DE LEON was changing both course and speed as she approached the WILMINGTON GETTY.

4. The District Court erred as a matter of law in assessing only 80% fault against the PONCE DE LEON. The causative potency and blameworthiness of the PONCE DE LEON's many serious faults fully account for the collision. The PONCE DE LEON should be held

in sole fault for the collision, or alternatively much more than 80% at fault.

Statement of the Case

The nature of the case, proceedings and disposition in the court below

Shortly after the collision and on August 8, 1973, Getty Oil filed suit against Sun/TTT; on October 2, 1973 Sun/TTT filed a counterclaim. The case was initially assigned to Judge Lawrence W. Pierce but on June 24, 1975 it was reassigned to Judge Richard H. Levet.

A trial on liability was held on September 19, 1975 before Judge Levet. At that trial the evidence of all fact witnesses was submitted by deposition and documents. The only live witnesses were experts [Dervin and Fonda, Joint Appendix (hereinafter JA) 448, 534].

On March 5, 1976, Judge Levet issued his Opinion, Findings of Fact and Conclusions of Law (JA 100-127), officially reported at 409 F. Supp. 909.

By letter dated April 12, 1976 (JA 129) Judge Levet, noting his intention to resign his judgeship and that he had been forced to work under "certain unfavorable conditions," returned the case to Judge Pierce.

A trial on damages was held on September 29, 1976 before Judge Pierce. Before trial the parties stipulated the amounts of

their respective damages (Getty Oil $146,000 and Sun/TTT $234,000) and thus, on the 80%/20% division of liability determined by Judge Levet, Getty Oil became entitled to recover a net balance of only $70,000 from Sun/TTT. (Thus, Getty Oil would recover less than half its damages because the PONCE DE LEON's damages were larger than the WILMINGTON GETTY's.) At the trial on damages the sole issue was whether Getty Oil was entitled to recover interest on the net balance it was to receive from Sun/TTT. In his discretion, Judge Pierce awarded Getty Oil interest at 6% from the date of the collision.

The final judgment was entered on October 22, 1976 (JA 131).

Statement of Facts Relevant to the Issues

The following statement of facts is based on the District Court's opinion and the evidence.

For the convenient reference of this court we attach hereto, as Annex I, a reproduction of the material portion of a chart for the area, on which we have sketched, for illustration only, the general approach of the PONCE DE LEON into collision with the anchored WILMINGTON GETTY, and the place of collision. As Annex II, we attach the Radar Annex to the Rules of the Road.

The Vessels

The WILMINGTON GETTY is a steam tanker, 583.5 feet in length and 74.2 feet in beam. At the material time she was carrying approximately 20,000 tons of cargo, with drafts of 31 feet 9 inches

forward and 31 feet 11 inches aft. The PONCE DE LEON is a steamship 700 feet in length and 92.2 feet in beam, with drafts of 21 feet 8 inches forward and 24 feet 6 inches aft. She was displacing approximately 19,400 tons. The distance from her bridge to her bow is approximately 350 feet (JA 101-102).

Weather and sea conditions at the time of collision

The collision occurred at approximately 1314 hours on May 10, 1973 (JA 18, 19). Dense fog prevailed (JA 103), described as "zero visibility" by the PONCE DE LEON's master (JA 267); the sea was smooth and the current was flooding at a velocity of .5 knot (JA 105)

The WILMINGTON GETTY's arrival in port and choice of anchorage area

The WILMINGTON GETTY's master (Brixen) is a licensed pilot of long experience (JA 212-213). Her Third Mate and Watch Officer (Farago) also had long experience at sea (JA 138-139). Both had many voyages in and out of New York Harbor (JA 191, 213).

On the morning of May 10, 1973, the WILMINGTON GETTY arrived in New York Harbor and was proceeding up Ambrose Channel in dense fog (JA 102-103). She passed Buoy 14 at 0822 hours and passed Buoy 18 at 0837.5 hours (JA 566) giving her an average speed of about 4.8 knots (JA 93). After passing Buoy 18 she turned out of the channel and her experienced master decided to anchor 300 yards south of Anchorage Area 25 (shown on charts, Trial Exhibits 2 and 21) to avoid crowding ships already there (JA 222, 241-242, 392).

She anchored .6 mile off Norton Point (JA 218), more than 300 yards from the edge of Ambrose Channel (JA 241), at 0856 hours. She had previously anchored in a similar location off Norton Point (JA 234), and Farago recalled having seen other vessels anchored in a similar location (JA 192).

Anchorage Areas Nos. 25 and 49C are shown on the charts, Exhibit 2 and 21, and are reproduced on Annex I. The anchorage area, per chart measurement,is approximately 1.5 miles long and .8 mile wide. Obviously this large anchorage area may be entered at any point. And, obviously, caution must be used by any entering ship to avoid creating a hazard to any ships already at anchor in or near the anchorage area. The WILMINGTON GETTY's moderate speed from Buoy 18 to her anchorage position averaged only about 3.2 knots (JA 93). [The caution and moderate speed of the WILMINGTON GETTY in approaching the anchorage area contrast sharply with the later actions of the PONCE DE LEON in approaching the anchorage area and the WILMINGTON GETTY.]

While at anchor heading into the flood current about parallel to the channel (160° - 168°), the WILMINGTON GETTY was sounding proper fog signals and monitoring her radar and radio (JA 104, Finding 12; JA 105, Finding 16; JA 146-152). Her anchor could be let go in two minutes (JA 110, 187, 190), and her engines were on a three to five minute standby (JA 103). Her master did not have the engines on immediate standby because he did not consider the

location dangerous (JA 232-233). Numerous vessels safely passed the anchored WILMINGTON GETTY (JA 149-152, 171, 405, 242, 396) - without the need for any radio communications or movement by the WILMINGTON GETTY.

The PONCE DE LEON's navigation

The PONCE DE LEON was equipped with two radars and a radio telephone (JA 105, 106). Inbound, she passed Buoy 14 at 1302 hours and passed Buoy 18 at 1309 hours, a distance of 1.25 miles in 7 minutes - a calculated speed of 10.5-11 knots (JA 107, Finding 21). She proceeded at an average speed of 12 knots from Buoy 18 to collision (JA 109, Finding 30). [The evidence and findings are in sharp contrast to the PONCE DE LEON's master's incredible testimony that her speed was only 5 knots (JA 275, 281).]

The PONCE DE LEON's master (Captain Meade) sighted the WILMINGTON GETTY by radar at a distance of two miles (JA 106, Finding 19; JA 271, 272, 295), and he knew the WILMINGTON GETTY was outside of Ambrose Channel (JA 273, 295). He claimed that at this first radar sighting the PONCE DE LEON was near Buoy 18 and the time was about five minutes before collision (JA 272-273). [In fact, the PONCE DE LEON was then one mile below Buoy 18 and the time was at least ten minutes before collision (JA 39-43). See infra pp. 24-26.]

The PONCE DE LEON took no action (i.e., made no radar plot) to determine the WILMINGTON GETTY's course, speed or closest point of

approach (CPA) (JA 274, 288, 295). Her master wrongly assumed [on scanty information and inadequate analysis], that the WILMINGTON GETTY was underway and proceeding very slowly north (JA 312). He also testified that the possibility that she was dead in the water "crossed my mind" (JA 327). The PONCE DE LEON decided to anchor and deliberately turned out of the channel, intending to pass immediately south (and supposedly astern) of the supposedly northbound WILMINGTON GETTY - without knowing what the WILMINGTON GETTY was doing (JA 299), despite having the means of knowing (radar). The PONCE DE LEON's inbound channel course was 345° (JA 300) and, in turning at Buoy 18, she started to change course to 010° (a change of 25 degrees) and thereafter continued turning right (JA 285, 286). If the PONCE DE LEON had not then turned out of the channel, there would have been no collision (JA 300), and she would have passed the anchored WILMINGTON GETTY by 375 yards (JA 343).

The WILMINGTON GETTY's timely and specific radio warning to the PONCE DE LEON

By radar, the WILMINGTON GETTY's mate alertly observed the PONCE DE LEON turn out of the channel, and he "immediately" called the PONCE DE LEON by radio and twice warned her that the WILMINGTON GETTY was anchored (JA 406, 568, Lines 9-17). [There is also evidence that before turning, the PONCE DE LEON's master knew the WILMINGTON GETTY was anchored. The PONCE DE LEON's watch officer,

Benson, testified that the PONCE DE LEON's master used the radio "to verify" that the WILMINGTON GETTY was at anchor. (JA 370, Line 3.)* By using the word "verify", clearly those on the PONCE DE LEON already knew the WILMINGTON GETTY was anchored.] The radio conversation took place at approximately 1311 hours or three minutes before collision when the PONCE DE LEON was .5 to .6 miles away from the WILMINGTON GETTY (JA 109).

The PONCE DE LEON's unfulfilled assurance that she saw the WILMINGTON GETTY and would keep clear

The PONCE DE LEON's master assured the WILMINGTON GETTY by radio that the PONCE DE LEON saw her and would keep clear (JA 284-285, 296). Certainly the PONCE DE LEON's master knew the PONCE DE LEON could easily avoid collision by her own maneuvers - or he would never have given that assurance. He did not expect the WILMINGTON GETTY to move out of the way and he knew she could not move in so short a time. He testified:

"Q. If she is at anchor it was your duty alone to avoid collision?

A. No question.

Q. There is nothing she could do to avoid collision?

A. No question about it." (JA 349.)

* * *

"Q. You knew she wasn't going to move to get out of the way since she was anchored?

A. She was anchored.

---

* Accord Farago, JA 153.

"Q. She couldn't move in a short time?

A. No." (JA 294.)

The PONCE DE LEON never informed the WILMINGTON GETTY that she could not avoid collision as she had promised nor did she ask the WILMINGTON GETTY to move.

The collision

After the radio conversation the WILMINGTON GETTY's mate observed by radar that the PONCE DE LEON would apparently pass clear ahead of the WILMINGTON GETTY. (JA 568, Lines 18-19, JA 156, 187, 407.)

The PONCE DE LEON's master claimed he watched the WILMINGTON GETTY "continuously" until collision (JA 274) but he made no estimate of the linear distance at which he would pass the WILMINGTON GETTY (JA 288). [Nor apparently did he take any steps to make sure the PONCE DE LEON passed clear as he had promised.] The PONCE DE LEON's officers testified that, as she approached the WILMINGTON GETTY, they reported the WILMINGTON GETTY's fog signals to the master, but the master denied receiving such reports. (JA 110, Finding 34).

Very shortly (seconds) before collision, the WILMINGTON GETTY's mate visually sighted the PONCE DE LEON proceeding to pass close ahead [southerly] of the WILMINGTON GETTY. He immediately sounded the danger signal. (JA 157.)

Those on the PONCE DE LEON sighted the WILMINGTON GETTY visually "just seconds" before collision (JA 111, Finding 35). Thereafter,

the PONCE DE LEON's forward two-thirds passed safely south of the WILMINGTON GETTY's bow, but her port side caught the WILMINGTON GETTY's anchor chain, dragging her bow into collision with the PONCE DE LEON's port side aft (JA 157, JA 568, Line 22). The PONCE DE LEON never stopped or reversed her engines before collision, and she was going so fast that if she had reversed her engines she could not have stopped in the water after visual sight and before collision. (JA 111, Finding 37).

It is self-evident that, in spite of her own reckless high-speed navigation, the PONCE DE LEON nearly avoided collision and could easil have avoided it altogether simply by navigating a little further to her right to clear the anchored WILMINGTON GETTY completely. Her failure to navigate safely past the WILMINGTON GETTY [despite her radioed assurance that she would do so] was negligence which the WILMINGTON GETTY had neither the duty to anticipate nor the capability to determine until it was too late to take action. We submit that holding the WILMINGTON GETTY contributorily liable in such a case imposed on her an unreasonable standard of care.

Comment on the lack of credibility of the PONCE DE LEON's master

Considering the many discrepancies in Captain Meade's testimony on speed, positions and signals, it is apparent that his testimony was largely designed to avoid charges of personal negligence. No weight can be given to his evidence on any controverted point.

ARGUMENT

The District Court's Clearly Erroneous Findings of Fact

We respectfully submit that when this court reviews the entire record, it will be left with a definite and firm conviction that mistakes have been committed on each of the following points. McAllister v. United States, 348 U.S. 19, 20 (1954).

A. The WILMINGTON GETTY's location at anchor was not "hazardous" or "dangerous" to any ship that was herself complying with the rules for proper navigation in fog. The WILMINGTON GETTY was approximately 375 yards outside of Ambrose Channel and numerous ships had safely passed her.

The District Court clearly erred as a matter of fact in finding that the WILMINGTON GETTY's location was "dangerous" or "hazardous" or in "close proximity to the outer perimeter of Ambrose Channel," etc. It made no findings as to her exact location at collision, although ample evidence exists on the record.

The evidence on the record is not only uncontradicted - the PONCE DE LEON's own chart, Exhibit 21 (Position marked "1314" and "Coll") and the testimony of her master Meade (JA 331) establishes that at collision the WILMINGTON GETTY was not less than 375 yards from the outer perimeter of Ambrose Channel. [Compare the PONCE DE LEON's collision position on Exhibit 21 with the WILMINGTON GETTY's position at anchor on Exhibit 2. The positions are

almost identical]. If the PONCE DE LEON had continued on course up the channel she would have passed the WILMINGTON GETTY by at least 375 yards (JA 343). Collision occurred only because the PONCE DE LEON deliberately turned out of the channel (JA 300) and thereafter failed to set a course sufficiently clear of the WILMINGTON GETTY's known position. The WILMINGTON GETTY did not impinge on Ambrose Channel. She presented no hazard to vessels being properly navigated.

The evidence is uncontradicted that ship traffic was heavy and that numerous ships safely passed the WILMINGTON GETTY, before and after the collision, without the need for any radio warnings from the WILMINGTON GETTY. (Farago, JA 149-152, 171, 405; Brixen, JA 242, 396). The ship one mile ahead of the PONCE DE LEON, the SEALAND BOSTON, passed clear of the WILMINGTON GETTY without difficulty. Obviously these many other ships made proper use of their radars and radios, and they had no difficulty in passing safely clear.

B. The WILMINGTON GETTY's precautions were proper for the circumstances and protected her from all ships other than the grossly negligent PONCE DE LEON.

After the WILMINGTON GETTY anchored she commenced sounding proper fog signals by ringing a bell on her bow, and a licensed mate was stationed on her bridge to monitor her radio (JA 104, Finding 12). It would have taken the WILMINGTON GETTY approxi-

mately three to five minutes to get under way using her engines (JA 103, Finding 7) and it would have taken approximately two minutes to let go her anchor (JA 110, Finding 31).

The District Court apparently overlooked the uncontradicted evidence as to the use being made of the WILMINGTON GETTY's radar and radio by her licensed mate.

The WILMINGTON GETTY's radar was set on the three mile scale (JA 147). The radar has a cursor (a form of a movable pointer) with a series of parallel lines across its face (JA 204, 205; JA 569, a diagram of the cursor). The cursor was lined up parallel to Ambrose Channel Buoys 18, 16 and 14 and those buoys were off the WILMINGTON GETTY's starboard bow (JA 147-148). The WILMINGTON GETTY was also parallel to Ambrose Channel (JA 105, Finding 16).

As Farago described it, after lining up the cursor with the Ambrose Channel buoys "as long as the target stayed to the right of the cursor marks, I knew that the vessel was in the clear." (JA 195, 405; see also JA 568 lines 4-7.)

Since ships navigating up the channel could be seen moving on tracks parallel with the channel, Buoys 14, 16 and 18 and parallel with the WILMINGTON GETTY's radar cursor, and well clear of the WILMINGTON GETTY, certainly there was no need to make a radar plot of each ship. Nor was there a need to communicate with each such ship by radio. The passing ships were obviously following the rules, including making proper use of their own

radars and radios to navigate safely. None of the other passing ships required periodic general security calls from the WILMINGTON GETTY to be able to pass her safely. The one radio channel, Channel 13, was already "quite heavily used" and the WILMINGTON GETTY's master was of the opinion that making periodic security calls would "crowd the channel unnecessarily for real, essential traffic." (JA 245, 291) The PONCE DE LEON's master testified that the fact that the WILMINGTON GETTY had not issued security calls "did not contribute to the collision" (JA 348).

C. The District Court clearly erred in failing to find that the WILMINGTON GETTY's specific radio warning to the PONCE DE LEON was timely and that, if the PONCE DE LEON had acted properly, the warning was sufficient for the PONCE DE LEON alone to have avoided the collision.

When the WILMINGTON GETTY's mate alertly observed the PONCE DE LEON turn out of the channel at Buoy 18, and toward the WILMINGTON GETTY, the WILMINGTON GETTY's mate immediately commenced calling the PONCE DE LEON by radio (Farago, JA 406, 568, Line 9). [The District Court erred in finding that "it was unclear as to who initiated the conversation" (JA 108-109). Given the lack of credibility of the PONCE DE LEON's master, there was no basis for giving his version any weight.] Farago informed the PONCE DE LEON that the WILMINGTON GETTY was anchored and the PONCE DE LEON assured the WILMINGTON GETTY that the PONCE DE LEON saw her

and would keep clear (JA 109, Finding 29, JA 284-285).

The communications were completed at approximately 1311 hours when the PONCE DE LEON was .5-.6 mile (about 3000-3600 feet)* from the WILMINGTON GETTY (JA 109, Finding 28).

The District Court apparently overlooked the evidence establishing that, after the WILMINGTON GETTY's warning, the PONCE DE LEON still had ample time and space to avoid collision with the WILMINGTON GETTY.

Sun/TTT's expert Dervin thought the PONCE DE LEON could avoid collision if he had a half mile distance between the ships. He would watch his radar carefully and "make sure" the ships passed safely (JA 515). See also Fonda, JA 545-546. The PONCE DE LEON can be turned 90° in less than 2000 feet in less than 1.5 minutes and can be turned in a full circle in less than approximately 2300 feet. (See the PONCE DE LEON's Maneuvering Characteristics, Left and Right Turning Circles, JA 590-591). Here, after the PONCE DE LEON negligently turned toward the WILMINGTON GETTY, a minor additional turn (coupled with careful radar use to make sure) would have carried the PONCE DE LEON clear of the WILMINGTON GETTY.

Because the PONCE DE LEON received a timely and specific warning that the WILMINGTON GETTY was anchored, it was error to find or conclude that the WILMINGTON GETTY should have issued general periodic security calls - which in any event had not been

---

* A nautical mile is approximately 6000 feet.

required by any of the many other vessels which had safely passed the WILMINGTON GETTY.

Similarly, since the WILMINGTON GETTY took reasonable and adequate precautions with her radar and radio, to give any approaching ship, such as the PONCE DE LEON, a timely and specific warning that she was anchored, it was error to find or conclude that the WILMINGTON GETTY should have kept her engines on standby for immediate movement rather than having the engines ready for movement on short (three to five minutes) notice. In the circumstances, to require the WILMINGTON GETTY to be ready to move instantaneously, despite the aforesaid timely radio warning made possible by proper use of radar, would be to require her to anticipate gross negligence by approaching ships. This is not the law.

D. The District Court clearly erred in failing to find that after the radio communications there was no time to make and analyze an accurate radar plot and to take effective action to move the WILMINGTON GETTY.

The District Court found that the WILMINGTON GETTY did not make a manual radar plot (JA 108) and criticized her for such failure (JA 112, 124). But the District Court never dealt with the issues of whether there was time for an accurate plot, analysis and effective avoiding action. [The District Court apparently (erroneously) assumed the anchored WILMINGTON GETTY had the same opportunities and duties as the PONCE DE LEON (JA 124-125)].

When placed in the proper perspective of time, speed and distance there was simply no time and no possibility for the WILMINGTON GETTY to make an accurate plot.

The PONCE DE LEON was moving at a high speed of 12 knots (JA 109, Finding 30). Thus, when she turned out of the channel at 1309 hours (JA 107-108), only five minutes remained until collision at approximately 1314 hours. This short time interval was entirely due to the negligently immoderate speed of the PONCE DE LEON.

Unquestionably, on seeing the PONCE DE LEON's turn, it was proper for the WILMINGTON GETTY's mate to immediately call the PONCE DE LEON by radio before doing anything else. By giving such timely warning, the developing risk of collision could be, and should have been, quickly abated by the PONCE DE LEON simply turning further to her right without the need for the WILMINGTON GETTY to try to move. Even Sun/TTT's expert, Dervin, agreed with this procedure (JA 522). At 1311 hours, or only three minutes before collision, the PONCE DE LEON acknowledged the WILMINGTON GETTY's warning and assured her that she would pass clear. The PONCE DE LEON then had ample time and space (3000-3600 feet) to avoid collision - thus, certainly, at 1311 the WILMINGTON GETTY had no duty to try to move. Rather, we submit, it was reasonable for the WILMINGTON GETTY's mate to rely on the PONCE DE LEON's assurance that she would keep clear.

After 1311, or any time less than three minutes before collision, there was no time to use the WILMINGTON GETTY's engine which required three to five minutes for use. Even if the engines could have been used astern immediately (and if there was a duty to use them) the immediate effect would have been to tighten the slack out of the WILMINGTON GETTY's anchor chain forward, leaving the PONCE DE LEON less room to pass clear.

Also, since it would take two minutes to let go the WILMINGTON GETTY's anchor chain, any decision to let go would have to have been made before approximately 1312 or more than two minutes before collision.

In proper perspective, any radar plot and analysis would have to take place instantaneously at 1311 if the engines were to be used or before 1312 if the chain were to be let go. [Any plot before 1311 would be useless because the PONCE DE LEON would be expected to, and did, change course to her right after the radio communications at 1311.]

Any radar plot and analysis would thus have to take place in approximately <u>one minute or less</u> (1311 to 1312). The PONCE DE LEON, with the burden of proving alleged negligence of the WILMINGTON GETTY, offered no proof as to whether any plot could have been made in so short a time. However, with the PONCE DE LEON changing both course and speed (JA 109, speed reduction; 333, Line 13 constant right turn), no accurate radar plot could be

possible in any event (Fonda JA 541, 553). Since there was no possibility of making an accurate plot, any criticism regarding the WILMINGTON GETTY's failure to plot is misplaced. There is simply no comparison between the situation of the PONCE DE LEON, which had more than 10 minutes available for plot and analysis and which could s ow or stop to make more time, and the situation thrust on the WILMINGTON GETTY by the PONCE DE LEON's approach at high speed.

The District Court also apparently overlooked the uncontradicted evidence from the WILMINGTON GETTY's mate, Farago, concerning his use of radar. He stated:

> "Continued to track vessel [PONCE DE LEON], radar showing a very fine picture of vessel clearing slightly ahead of me." (JA 568, Lines 18-19, JA 156, 187, 407.)

Farago's radar appraisal in the short time available was very accurate considering the circumstances. The PONCE DE LEON was turning to her right and the forward two thirds of her length passed clear of the WILMINGTON GETTY - but, since she did not turn quite far enough, she came into contact with the WILMINGTON GETTY's anchor chain and dragged the WILMINGTON GETTY's bow into contact with the PONCE DE LEON's after port side. (JA 568, Lines 19-24, JA 409, Line 16.)

Clearly, in view of the PONCE DE LEON's assurance of passing clear and her apparent progress as observed on radar, the WILMINGTON GETTY had no duty to try to move until visual sight just seconds before collision - when it was too late to take any

avoiding action (JA 206). It should be borne in mind that at no time did the PONCE DE LEON give the WILMINGTON GETTY any warning that she expected difficulty in passing clear or request any assistance.

We submit it was most unreasonable to criticize the WILMINGTON GETTY's mate for failing to make a radar plot and thus for failing to detect that the PONCE DE LEON would cut a few feet closer to the WILMINGTON GETTY than he judged in the short time available and after the PONCE DE LEON assured him that it would keep clear - especially since there was no possibility of making an accurate plot in any event.

E. The District Court clearly erred in failing to find that the PONCE DE LEON sighted the WILMINGTON GETTY at a distance of 2 miles at least 10 minutes before collision and 5 minutes before the PONCE DE LEON turned out of the channel towards the WILMINGTON GETTY.

In Finding 19 (JA 106), the District Court correctly found that the PONCE DE LEON sighted the WILMINGTON GETTY at 2 miles on her radar. (JA 271, 272, 295) But the finding that the time of first sighting was "Just prior to coming abeam of Buoy 18" is at best unnecessarily vague and at worst clearly erroneous.

In the Pre-Trial Order (JA 19-21) and in Getty Oil's Proposed Findings of Fact (JA 39-43) we outlined the relevant distances and times from the PONCE DE LEON's records. Not only was

no contrary evidence offered by defendants but - in their Proposed Findings of Facts (JA 70, paras. 10 and 11) - Sun/TTT agreed that the PONCE DE LEON sighted the WILMINGTON GETTY at approximately 1300 hours - or as much as 14 minutes before collision. Further, just considering her speed of 10.5 - 12 knots (JA 107, 109), the PONCE DE LEON would have covered the two mile distance in not less than 10 minutes. Also, since Buoy 18 was one mile from the collision position (JA 109), at first sight the PONCE DE LEON must have been one mile south of Buoy 18.

Certainly there was time for the PONCE DE LEON to take steps to determine that the WILMINGTON GETTY was stationary and keep clear of her. If she needed more time, the PONCE DE LEON should have stopped and made time for a plot.

In Finding 20 (JA 106) the District Court repeats a clearly erroneous point engendered by an erroneous "recollection" of defense counsel at trial (JA 38, JA 328 Line 13 to JA 329 Line 3). In Finding 13 (JA 105) the District Court correctly found that the PONCE DE LEON maintained a distance of approximately one mile behind the SEALAND BOSTON. Thus, when the PONCE DE LEON first sighted the WILMINGTON GETTY at 2 miles shortly after 1300, the SEALAND BOSTON must have been one mile from the WILMINGTON GETTY or in the vicinity of Buoy 18. Later, when the PONCE DE LEON reached Buoy 18, the SEALAND BOSTON would have been passing the WILMINGTON GETTY. And, if at such passage, the radar echoes of the SEALAND BOSTON and WILMINGTON GETTY apparently merged on

the PONCE DE LEON's radar scope, that circumstance gives no basis for criticizing the WILMINGTON GETTY's position - which is established at 375 yards outside the channel, supra pages 15-16. Why the radar echoes merged would depend on what course the SEA-LAND BOSTON followed, how far she passed off the WILMINGTON GETTY and the technical characteristics of the PONCE DE LEON's radar - subjects on which no evidence was adduced by defendants.

If the radar echoes merged, that provides no excuse for the PONCE DE LEON's actions. The plain fact is that the PONCE DE LEON's master had both the WILMINGTON GETTY and the SEALAND BOSTON in radar sight, and he saw the SEALAND BOSTON approach and pass the WILMINGTON GETTY (JA 328-329). But he took no steps to plot to determine the WILMINGTON GETTY's course, speed or closest point of approach (C.P.A.) (JA 288, 299-300) - which would have clearly established that the WILMINGTON GETTY was stationary.

The PONCE DE LEON's master through his own neglect did not know what the WILMINGTON GETTY was doing. It was gross negligence to blindly turn out of the channel toward the WILMINGTON GETTY under those circumstances. After blindly turning out of the channel toward the WILMINGTON GETTY, the PONCE DE LEON's master still took no steps to determine by what distance he would pass the WILMINGTON GETTY (JA 288), after assuring the WILMINGTON GETTY that the PONCE DE LEON would pass clear.

When all of the facts are placed in their proper perspective,

it is clear that the PONCE DE LEON's master had all the information he needed (by radar and radio) and that if he had used that information and navigated properly no collision would have occurred.

FIRST POINT

THE MANY GROSS FAULTS OF THE PONCE DE LEON FULLY ACCOUNT FOR THE COLLISION, AND SHE SHOULD HAVE BEEN CONDEMNED IN SOLE FAULT.

IN ADDITION TO HER ADJUDICATED FAULTS OF EXCESSIVE SPEED, FAILURE TO STOP AND MAKE A RADAR PLOT, AND FAILURE TO STOP HER ENGINES ON HEARING THE WILMINGTONG GETTY'S FOG SIGNALS, THE PONCE DE LEON CAUSED THE COLLISION (A) BY BLINDLY TURNING OUT OF THE CHANNEL TOWARD THE WILMINGTON GETTY, CREATING A HAZARDOUS CLOSE QUARTERS SITUATION WHERE NONE HAD EXISTED BEFORE, AND (B) BY FAILING TO MAKE PROPER USE OF HER TWO RADARS TO AVOID COLLISION AFTER TIMELY WARNING BY THE WILMINGTON GETTY AND AFTER ASSURING THE WILMINGTON GETTY THAT SHE HAD SEEN HER AND WOULD PASS CLEAR.

The District Court's conclusion that the PONCE DE LEON proximately caused the collision through her faults of excessive speed, failure to stop and make a radar plot and failure to stop engines on hearing the WILMINGTON GETTY's fog signals are fully supported by the facts and are in accord with the law (JA 118-120). The record also establishes additional serious faults, for which the PONCE DE LEON should have been condemned.

A. The District Court erred as a matter of law in failing to condemn the PONCE DE LEON in fault for blindly turning out of the channel, creating a hazardous close quarters situation where none

existed before.

The facts establish that, if the PONCE DE LEON had remained on course up the channel, she would have passed the WILMINGTON GETTY by at least 375 yards and that, when the PONCE DE LEON turned out of the channel, her master did not know what the WILMINGTON GETTY was doing. Clearly, risk of collision was created only by the PONCE DE LEON's blind turn out of the channel towards the WILMINGTON GETTY, negligently creating a hazardous close quarters situation where none existed before.

Blind turns, at high speed, toward a vessel whose course, speed and intentions are unknown,have always been condemned by the courts. Tug Julia C. Moran v. U.S.N.S. Comet, 1967 A.M.C. 1348, 1350, 1358, 1360 (S.D.N.Y. 1967) (not officially reported); Villain & Fassio E. Compagnia v. Tank Steamer E.W. Sinclair, 207 F. Supp. 700, 706, 708-709 (S.D.N.Y. 1962), aff'd 313 F. 2d 722 (2 Cir. 1963).

The proper use of radar includes the duty not only to avoid collisions, but also the duty to avoid close quarters situations - since obviously vessels which never enter into a close quarters situation clearly cannot collide.

While the term "close quarters situation" is not mentioned in the U.S. Inland Rules, 33 USC § 151 et seq. (which have not been modified in many years, nor modernized), the term is used in the International Rules, 33 USC § 1051 et seq. which were

modernized after the 1960 Safety of Life at Sea Convention to include the use of radar. International Rule 16(c), 33 U.S.C. § 1077(c), provides:

> "A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close quarters situation but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collision and then navigate with caution until danger of collision is over."

Rule 16(c) is supplemented by the Radar Annex to the Rules entitled "Recommendations on The Use of Radar Information As An Aid to Avoiding Collision At Sea," 33 U.S.C. §1094, attached as Annex II to this Brief.

The new International Rules have been in effect since 1965 not only on the oceans but also on the inland waters of most foreign countries, few of which have their own Inland Rules (33 USC §1061, 1092).

The new International Rules were developed at an international conference and thus embody the ordinary practice of seamen. Inland Article 29 (33 USC §221), the "Rule of Good Seamanship", provides in material part:

> "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect ... of any precaution which may be required by the ordinary practice of seamen..."

As such, the recommendations in the Radar Annex should be considered applicable on all waters by custom and practice, if not directly

by statute. Meadows, Radar Annex and Rule 16, 5 Willamette Law Journal 399, 414, n. 29 (1969).

What constitutes a close quarters situation is not defined in the rules. One English Court has stated

> "That, I think, must depend upon the size, characteristics and speed of the ships concerned." The Verena [1961] 2 Lloyd's List Law Reports 127, 133 (Court of Appeal).

Obviously the distance constituting a close quarters situation must also depend upon the nature of the waters, i.e. whether on the open seas, or in narrow inland passages. Whatever the waters, the import is clear - a moving ship, such as the PONCE DE LEON, should take early and substantial action to avoid a close quarters situation with a vessel detected by radar forward of her beam, but if such a situation cannot be avoided, she should stop her engines in proper time to avoid collision and navigate with caution until danger of collision is past. See Ove Skou Rederi A/S v. Nippon Yusen Kaisha, Ltd., 1971 A.M.C. 470, 474 (S. Ct. of Canada 1970, not officially reported). The PONCE DE LEON failed to do any of these things - additional points of blame against her.

Here the WILMINGTON GETTY was well outside of the channel but, regardless of where she was, she was a condition of navigation which the PONCE DE LEON had seen long before collision and which the moving PONCE DE LEON was bound to take into account. The PONCE DE LEON had ample room to navigate (See Annex I) and she has no excuse for running down an anchored ship. The Randa, 56

F. Supp. 508, 511 (S.D.N.Y. 1944); The Bright, 38 F. Supp. 574, 580-581 (D. Md. 1941).

The PONCE DE LEON's master sighted the WILMINGTON GETTY at a distance of two miles at least 10 minutes before collision. Since the PONCE DE LEON's master made no radar plot and did not know that the WILMINGTON GETTY was stationary, 5 minutes before collision he turned the PONCE DE LEON blindly out of the channel into a close quarters situation with the WILMINGTON GETTY; then he compounded the error by failing to stop engines and navigate with caution until danger of collision was over - all in violation of Article 29, the ordinary practice of seamen. (JA 546-547, 551.) These grossly negligent acts were proximate causes of the collision.

B. The District Court erred as a matter of law in failing to condemn the PONCE DE LEON in fault for failing to make proper use of her two radars to avoid collision, after turning out of the channel, after a timely warning from the WILMINGTON GETTY, and after the PONCE DE LEON had assured the WILMINGTON GETTY that she had seen her and would keep clear.

Even after turning out of the channel and after receiving a timely warning by the WILMINGTON GETTY that she was anchored, the PONCE DE LEON had ample time (at least three minutes) and space (.5 to .6 miles) to alone avoid collision. (Supra, pp. 18-20.)

Recommendation 4 in the Radar Annex states the proper standard:

"When action has been taken under Rule 16(c)

> to avoid a close quarters situation, it is essential to make sure such action is having the desired effect." (Emphasis added.)

To keep clear, Sun/TTT's expert, Dervin, would watch the radar carefully and "make sure" he kept clear of a ship such as the WILMINGTON GETTY (JA 514). According to Getty Oil's radar expert, Fonda (JA 545-546), using radar, a danger circle should be set up around the target (radar echo) to be avoided; then by trial and error (i.e. by adjusting the PONCE DE LEON's course as necessary) the PONCE DE LEON could make sure the pip (radar echo) motion line would not come within the danger circle - thus passing at a safe distance. The PONCE DE LEON's master took no steps even to determine the linear distance by which he would pass the WILMINGTON GETTY (JA 288) and thus took no precautions to make sure the PONCE DE LEON would avoid collision, as she could have done.

The PONCE DE LEON's failure to make proper use of her radar to avoid collision - after blindly turning out of the channel and after receiving a timely warning from the WILMINGTON GETTY - was a proximate cause of the collision - additional to her failure to make a radar plot.

To our knowledge no court in this country has ruled on the issue of whether the Recommendations in the Radar Annex apply on our Inland Waters under Article 29 as "the ordinary practice of seamen" - particularly the duty to avoid close quarters situations. **This court should so rule in the interest of maritime safety.**

SECOND POINT

THE WILMINGTON GETTY DID NOT CAUSE OR CONTRIBUTE TO THE COLLISION - SHE SHOULD HAVE BEEN EXONERATED FROM ALL LIABILITY.

THE DISTRICT COURT'S CRITICISMS OF THE WILMINGTON GETTY WERE BASED ON CLEARLY ERRONEOUS FINDINGS OF FACT AND ON MISCONCEPTIONS OF THE APPLICABLE LAW WHICH WOULD IMPOSE ON THE WILMINGTON GETTY A HIGHER STANDARD OF CARE THAN REASONABLE PRUDENCE - IN EFFECT REQUIRING HER TO ANTICIPATE AND OVERCOME THE CONSEQUENCES OF THE PONCE DE LEON'S INCOMPREHENSIBLE AND GROSS NEGLIGENCE, DESPITE THE PONCE DE LEON'S ASSURANCE THAT SHE WOULD KEEP CLEAR.

Probably the District Court's primary error in its overall approach to the case was its failure to consider the effect of modern aids to navigation such as radar (which is in nearly universal use) and radio (use of which became mandatory on January 1, 1973, 33 C.F.R. § 26.01 et seq) on the duties of the WILMINGTON GETTY.

Prior to the advent of radar and radio, ships that anchored very near channels may reasonably have been obligated to keep their engines on immediate standby and keep men ready to let go the anchor, to be ready to try to move to avoid being struck by a ship suddenly appearing in the fog at close range. Such an approaching vessel would ordinarily be slowly groping through the fog, affording time so that releasing an anchor chain after visual sight could in some circumstances be useful. If the moving ship is negligently proceeding at immoderate speed, the time between visual sight and collision would be very short and there

may be no time for the anchored ship to move - even using her engines. See Victorias Milling Co. v. The SS Gulfport, 166 F. Supp. 396, 399 (S.D.N.Y. 1958). Large loaded ships at anchor simply cannot move quickly. They must basically rely on the moving vessel to comply with the law and navigate carefully.

A moving vessel is always far better able to avoid collision than one lying at anchor because the former has steerageway and great flexibility as to where she can go, while the latter is largely helpless. Therefore, as a practical matter the anchored vessel's duty to try to move to avoid collision only arises when it is clear that the moving vessel cannot do so alone, which ordinarily is when she has come extremely close to the anchored vessel and is in visual sight - unless the moving vessel has given warning earlier. We have found no case which imposes on an anchored vessel a duty to try to move to avoid being struck by a moving vessel before the moving vessel has come into visual sight, and we submit it was unreasonable to impose such a duty in this case.

It should be borne in mind that, with both radar and radio, as was the case here, an anchored ship can timely sense a potentially dangerous situation and timely communicate with any approaching ship so that she is not forced to speculate on the approaching ship's future movements and intentions. The ships can quickly exchange any necessary information, and the moving ship can and, when necessary, must state her "intentions", including whether she

requires assistance to avoid collision. The Radio Telephone Regulations, 33 C.F.R. § 26.04 (b) state in material part:

> "Each person who is required to maintain a listening watch under Section 5 of the Act [33 USC § 1201, et seq.] shall, when necessary, transmit and confirm, on the designated frequency, the intentions of his vessel and any other information necessary for the safe navigation of vessels." (Emphasis added.)

Here, the PONCE DE LEON's master transmitted all the information he considered necessary for safe navigation - namely, his assurance that he would keep clear of the WILMINGTON GETTY. If he thought he could not and thought action by the WILMINGTON GETTY necessary for safe navigation - which he admittedly did not - he had a duty to transmit a request. He never did, although he was the person most familiar with the PONCE DE LEON's capabilities and intentions. To require the WILMINGTON GETTY to somehow timely divine that the PONCE DE LEON would not pass entirely clear would be to impose on the WILMINGTON GETTY a duty far beyond that of reasonable care.

A. Considering the other safety measures adopted by the WILMINGTON GETTY as a matter of foresight, the District Court erred as a matter of law in holding the WILMINGTON GETTY contributorily negligent for failing (1) to issue "additional" security calls, (2) to keep her engines on "Standby," and (3) to "let go the anchor chain after observing the PONCE DE LEON on radar." In so doing the court in effect required the WILMINGTON GETTY to anticipate

the PONCE DE LEON's incomprehensible and gross negligence.

1. The WILMINGTON GETTY had no duty to issue additional security calls after anchoring and, in any event, their omission did not contribute to collision.

As an alternate safety measure to issuing periodic general security calls (which would have further burdened the heavily used radio channel) the WILMINGTON GETTY established a safety precaution that allowed her to give timely and specific warning to any vessel leaving the channel and approaching her in her safe location 375 yards outside the channel. As a matter of foresight, we submit that this procedure was as good a safety measure as issuing periodic general security calls which are not required by statute or regulation and, like periodic (statutory) fog signals, may not always be timely heard and heeded. Considering the grossly negligent acts of the PONCE DE LEON, there is no reason to believe that the PONCE DE LEON's master would have heard or heeded periodic general security calls, as he did not heed the WILMINGTON GETTY's fog signals, even when reported to him.

As a further safety precaution, the WILMINGTON GETTY monitored her own radar and she had a right to assume that moving ships would navigate properly, including using their radars to timely observe her and avoid a close quarters situation.

The WILMINGTON GETTY's precautions were effective so that

numerous vessels safely passed her without need for periodic security calls. The PONCE DE LEON had seen the WILMINGTON GETTY long before turning out of the channel and she also would have known that the WILMINGTON GETTY was stationary if she had made proper use of her radar.

We submit that, considering the WILMINGTON GETTY's other safety precautions, the failure to issue additional security calls (at unstated intervals) after anchoring was not negligent and did not contribute to the collision. The imposition of a duty to issue additional security calls could only be based on a requirement to anticipate the PONCE DE LEON's gross negligence, contrary to law.

Finally, absence of periodic security calls did not contribute to the collision. Three minutes before the collision, knowing where the WILMINGTON GETTY was lying at anchor, half a mile away, the PONCE DE LEON assured her that she would pass clear, a maneuver the PONCE DE LEON was perfectly capable of effecting. Under those circumstances, the absence of additional security calls, even if a fault, was so remote as not to have contributed to collision. The PONCE DE LEON's master admitted that the absence of security calls did not contribute to collision (JA 348). In short, at most, their omission amounted to a condition rather than a cause of collision. Griffin, The American Law of Collision, § 218 (1949), and cases cited therein.

2. The WILMINGTON GETTY had no duty to keep her engines on immediate standby.

It has already been established that the WILMINGTON GETTY's location 375 yards outside the channel was not "hazardous" for any vessel being properly navigated. Supra, pp. 15-16. Therefore, considering the safety precautions established by the WILMINGTON GETTY's master, as a matter of foresight the WILMINGTON GETTY had no duty to keep her engines on immediate standby. By proper use of radar she could detect a potential risk in time to use her engines on short notice, three to five minutes - if she was not successful in contacting such vessels by radio. Here, in fact, the WILMINGTON GETTY gave the PONCE DE LEON a timely warning and received the PONCE DE LEON's assurance that she saw the WILMINGTON GETTY and would keep clear. The WILMINGTON GETTY had no duty to be ready to use her engines instantly in these circumstances - unless she was required to anticipate that the PONCE DE LEON would not carry out her stated assurance to keep clear, i.e. the PONCE DE LEON's negligence. That is not the law.

Moreover, there is no evidence that it was customary for a ship lying at anchor to keep her engines on standby, ready for immediate use. See The Charles Hubbard, 229 F. 352, 356 (6 Cir., 1916), a case involving a vessel anchored about 250 feet from a range line [ordinarily marking the center of the channel], presumably a far more "dangerous locale" than that of the WILMINGTON GETTY, which was about 375 yards from the edge of the channel.

The District Court's Opinion in the instant case does not meet the ruling in The Charles Hubbard squarely, but merely asserts that the instant case "does not reflect the 'customary' situation of a ship at anchor " as the WILMINGTON GETTY was in a "dangerous locale". (JA 123) This is not at all the same as finding it was customary for a ship at anchor where the WILMINGTON GETTY was to keep her engines on standby. Even Dervin, Sun/TTT's expert, did not testify there was any such custom but merely said he would have kept the engines on standby without apparent consideration of the circumstances that the ship was anchored well outside the channel and following the above-mentioned precautions with radar and radio. Thus, no custom was established, and the District Court made no finding that any such custom existed. Accordingly, it was not a fault not to put the engines on standby.

3. The WILMINGTON GETTY had no duty to let go her anchor after observing the PONCE DE LEON on radar

The District Court's Opinion states that "the WILMINGTON GETTY should have 'let go the anchor chain' after observing the PONCE DE LEON on radar." (JA 123.) Precisely when* the anchor chain should have been let go is unstated, but the court's thinking is to some extent clarified when it says later (JA 124):

> "Under the circumstances, the Wilmington Getty had ample time to 'let go the anchor chain'

---

* Getty Oil's counsel sought to cross-examine Sun/TTT's expert witness to elicit his view as to "when", but was cut off by the District Court (JA 524).

> after observing the Ponce De Leon on radar and after the radio communication which took place at 1311 on May 10, 1973 and thereby avoid a collision."

In support of its conclusion, the court quoted from Sun Oil Company v. S.S. Georgel, 245 F. Supp. 537 (S.D.N.Y. 1965) (JA 123) but did not mention a pertinent principle from that case, namely that the anchored vessel "is under no obligation to resort to extraordinary maneuvers ..." (p. 545).

Similarly, the District Court's reliance on Wells v. Armstrong, 29 F. 216 (S.D.N.Y. 1886), is unjustified. That case concerned a clear weather situation in which an anchored sailing vessel was in the process of heaving anchor amidst a large fleet of 150 vessels (most of them moving). An approaching sailing vessel was having difficulty in a light wind and strong current and, to assist in avoiding collision, she twice hailed the anchored vessel to starboard her helm (to swing in the current) and pay out chain (the anchor chain already being operated) but the anchored ship did neither. Accordingly, the facts there were very different from the cause at bar, where the WILMINGTON GETTY could not see the PONCE DE LEON visually until seconds before collision and of course received no request to take action.

As we have already said, the District Court did not say precisely when it thought the WILMINGTON GETTY should have let go of the anchor chain. It cannot be seriously suggested that she should have done so when first observing the PONCE DE LEON turning out of the channel, a mile away and five minutes before col-

lision. The District Court does suggest that she should have let go of the anchor chain after the 1311 radio conversation in which she received an unequivocal assurance that the PONCE DE LEON had seen her and would keep clear - a proposed maneuver which was easily within the PONCE DE LEON's capability if properly navigated. The PONCE DE LEON never advised the WILMINGTON GETTY of any difficulty and never requested her to move. The WILMINGTON GETTY's watch officer observed by radar that the PONCE DE LEON was proceeding ahead of the WILMINGTON GETTY. In view of her radio assurance, he had no reason to think that the PONCE DE LEON's navigators would not govern her navigation so as to pass clear, - at least until visual sight only seconds before collision when there was no time to let go the anchor (JA 206) or take other effective action.

To suggest that the WILMINGTON GETTY had a duty to let go her anchor, and give the PONCE DE LEON"additional latitude" (JA 124) before she could know that the PONCE DE LEON would not keep clear is to hold that she had a duty to immediately disbelieve the PONCE DE LEON's assurance - in short to anticipate her future negligence.

4. The WILMINGTON GETTY had no duty to anticipate the PONCE DE LEON's gross negligence.

In considering the three foregoing alleged faults of the WILMINGTON GETTY (and the charge of no radar plot discussed, infra, Part B) we respectfully suggest that the District Court overlooked the fundamental principle that there was no duty to anticipate

such gross and incomprehensible negligence as the PONCE DE LEON displayed. Only if the WILMINGTON GETTY were obligated to anticipate such negligence can it be said that she had a duty in the exercise of reasonable care to take actions beyond what she in fact did.

The proper rule was stated by the Supreme Court in The Oregon, 158 U.S. 186 (1894), a case in which the anchored Clan Mackenzie was exonerated, although she visually saw the Oregon from a distance of three-quarters of a mile three minutes before collision. It was asserted by the moving Oregon that the Clan Mackenzie should have taken additional measures besides hailing the Oregon, namely ringing a bell or swinging a lantern or torch. In exonerating the Clan Mackenzie, the court said, at pages 203-204:

> "In measuring her duty under the circumstances of this case, it must be borne in mind that her lookout had no reason whatever to apprehend danger, until the Oregon had rounded Goble's Point, and taken her course for Coffin Rock. She was then about three-quarters of a mile distant, and at her rate of speed of fifteen miles an hour, (a mile in four minutes,) would cover this distance in three minutes. Even then he had a right to assume that she would take the usual course down the centre of the channel, would see his light, and give it a proper berth. He certainly was not bound to presume that she would be guilty of the gross and almost incomprehensible negligence of turning from her proper course and running directly down upon him, and until it became manifest that she had not observed his light, he was not called upon to act. It was then too late to light a torch, if he had had one at hand, or perhaps even to ring a bell, and in view of the finding of the Circuit Court that, if a torch or flash light is not already prepared and at hand and ready for use, it would take

> five minutes to obtain one from the place where they are usually kept and light it, we are unable to understand how the court could have held the Clan Mackenzie liable for the non-exhibition of a torch, unless upon the theory that it was her duty to keep one lighted all the time."
>
> (Emphasis added.)

See also Long Island Railroad Co. v. Killien, 67 F. 365, 368 (2 Cir. 1895); The S.S. Randa, 56 F. Supp. 508, 511 (S.D.N.Y. 1944); The Charles Hubbard, 229 F. 352, 356 (6 Cir. 1916); The Ceylon Maru, 266 F. 396, 402 (D. Md. 1920); The Bright, 38 F. Supp. 574, 581 (D. Md. 1941); cf. Union Oil Company of California v. The Tugboat San Jacinto, 409 U.S. 140, 146 (1972).

A fortiori here, the WILMINGTON GETTY should have been exonerated, since she had warned the PONCE DE LEON by radio and received her assurance that she would pass clear, and the PONCE DE LEON had actually turned and was passing south of the WILMINGTON GETTY. As a matter of reasonable care the WILMINGTON GETTY had no obligation to do more than she did. She had no duty to anticipate any of the incomprehensibly negligent actions of the PONCE DE LEON from her excessive speed until her final failure to clear the motionless WILMINGTON GETTY. In the words of The Oregon, until "it became manifest" that the PONCE DE LEON would not pass clear, the WILMINGTON GETTY was not obligated to take further action. It only became manifest when the PONCE DE LEON came into visual sight. By then it was too late. But that was solely the PONCE DE LEON's fault for not giving a wide enough berth or a

radio warning to the WILMINGTON GETTY.

B. The District Court also erred as a matter of law in holding the WILMINGTON GETTY negligent for failing to make a radar plot of the PONCE DE LEON under circumstances in which there was no time to plot due to the PONCE DE LEON's excessive speed and it was impossible to make an accurate and useful plot because of the PONCE DE LEON's continually changing course and speed.

The WILMINGTON GETTY's mate unquestionably made proper use of her radar to promptly detect that the PONCE DE LEON had turned out of the channel toward her; and this information immediately caused the WILMINGTON GETTY's mate to call the PONCE DE LEON on radio. Certainly there was no time to plot while communicating between approximately 1309 and 1311 hours, after which the PONCE DE LEON commenced changing course and speed as expected, based on her radio assurance that she would keep clear. In any event, a plot before 1311 would have been useless as thereafter the PONCE DE LEON was changing course.

To be effective, moreover, any radar plot would have to have been completed before 1311 if the WILMINGTON GETTY were required to use her engines, and before 1312 if she were going to let go her anchor chain. Thus the plot would have to be made literally instantaneously at 1311 or within one minute before 1312. As explained, infra, p.45 , a radar plot requires over three minutes.

Clearly time did not exist for a radar plot because of the PONCE DE LEON's high speed and, with the PONCE DE LEON changing

both course and speed, no radar plot could possibly be accurate even if there had been adequate time.

This court has never dealt with the duty of an anchored vessel to plot. Here the District Court (JA 124-125) apparently assumed that an anchored ship had the same duty to plot as the moving PONCE DE LEON. We submit this was in error.

In Afran Transport Co. v. The Bergechief, 274 F. 2d 469, 475 (2 Cir. 1960) this court fully recognized that plotting takes time, and it established the rule that a moving vessel must stop and make time for a plot, if necessary. This court accepted proof in Afran Transport, at p. 475, to the effect that it takes more than three minutes for a plot. Here, because of the PONCE DE LEON's high speed, the WILMINGTON GETTY did not have more than three minutes to plot between 1311 and 1314, because collision occurred at 1314 - before a plot could be completed.

Also, in addition to the lack of time for plotting, Getty Oil established by uncontradicted evidence that, if a ship is changing course and speed, as the PONCE DE LEON was here, an accurate plot is impossible and, indeed, a plot may be misleading (Fonda, JA 542, 553). Accord, Healy, Radar and the New Collision Regulations, 37 Tulane Law Review 621 (1963) at pages 622 (even radical changes of course or speed do not immediately become apparent) and 637 (plotting only determines past course and speed and cannot show present course and speed, let alone future).

Clearly the duties of moving ships and anchored ships with

respect to radar plotting are quite different. The moving ship has two duties (and capabilities) which the anchored ship does have: (a) the moving ship must (and can) stop and make time for a plot, and (b) the moving ship is required to (and can) maneuver to avoid a close quarters situation.

Since it was impossible to make an accurate radar plot and there was no time for a plot in any event, we submit that it was clear error to condemn the anchored WILMINGTON GETTY for failure "to make a manual plot after observing the PONCE DE LEON by radar."

C. The District Court mistakenly concluded that the holding in U.S.A. v. Reliable Transfer, Inc., 421 U.S. 397 (1975), required it to disregard the doctrine earlier laid down by the Supreme Court that where fault of one vessel suffices to account for a collision, any reasonable doubt as to the conduct of the other should be resolved in her favor. As a consequence it wrongly condemned the WILMINGTON GETTY for what at most could be merely doubts as to her conduct.

As we have seen in sub-points A and B, supra, the District Court held the WILMINGTON GETTY in contributory liability for asserted omissions of actions which, upon closer examination, either were not breaches of any duty of reasonable care or could not reasonably be performed or did not proximately cause the collision. In doing so, the court was misled by an erroneous appraisal of the effect of U.S.A. v. Reliable Transfer, Inc., 421 U.S. 397 (1975).

After discussing Reliable and the doctrine loosely called "major-minor", the court concluded (JA 117):

> "... maritime collision case law must be re-evaluated and re-analyzed. If courts follow a policy of stare decisis et non quieta movere, the purpose of Reliable will never be fulfilled. Courts must be wary not to apply major-minor precedents as a basis for deciding post-Reliable cases since such applications will destroy apportionment in maritime collision lawsuits."

And, as a preliminary which it needed to justify holding the WILMINGTON GETTY in contributory liability, the court further (erroneously) stated (JA 121):

> "As was heretofore mentioned, the acts of a vessel must be viewed in a different light as the result of U.S.A. v. Reliable Transfer, supra. Courts must take a fresh look as to what constitutes negligence so that the true purpose of Reliable may be achieved." (Emphasis added.)

We respectfully urge that the court has erred in the foregoing reasoning. Reliable has not altered "what constitutes negligence." In particular it did not alter but indeed restated the basic requirement that collision liability must be predicated upon fault (i.e., breach of a duty) which causes damage. Thus in Reliable, at page 411 the Supreme Court held:

> "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault..." (Emphasis added.)

The so-called "major-minor" rule, as discussed in Griffin, The American Law of Collision, (1949) § 224, is to a large extent misnamed. Griffin describes three categories. Only one, headed "Slight fault disregarded", is truly a "major-minor" situation; and the cases in which a contributory fault has been truly disregarded are few and far between. Griffin cites only three - two erroneously, for they concern either situations of doubtful and non-contributory fault, The Lord O'Neill, 66 F. 77 (4 Cir. 1895), or absence of fault and non-contributory fault, Theothilatos v. Martin Marine Transp. Co., 127 F.2d 1016 (4 Cir. 1942). The only case cited by Griffin lending support to the proposition that a sufficiently minor contributory fault should be disregarded entirely is The Great Republic, 90 U.S. (23 Wall.) 20 (1875) in which the overtaking vessel Republic was held solely to blame for colliding with the overtaken Cleona. The court summarized its view by saying, at page 35:

> "... On a full and fair consideration of the whole evidence, we are satisfied the officers of the Cleona, when the boat was turned to the right shore, had no ground to fear a collision, and that the boat itself was far enough ahead to cross with safety, if the Republic, instead of following after her, had pursued her course on the left side of the river. It is pretty clear that the Cleona did not blow her whistle for each boat to keep to the right, as soon as she started for the opposite shore. [She blew about one-half minute later.] This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think, under the circumstances, the Cleona should share the consequences of

this collision with the Republic."

The Cleona's fault might have been regarded as non-contributory, in that, after it was committed, the Republic by the slightest exercise of care could have avoided collision; nevertheless, the court certainly indicates it was simply disregarded. It may be doubted whether the same conclusion would be reached today, and the result was especially curious because the Supreme Court's conclusion was opposite to the Circuit Court's, which had held the Cleona solely liable. In any event, if "major-minor" is taken to include only this rare category of case, we think the District Court's view here was unexceptionable. However, the court went far beyond that when it suggested that "what constitutes negligence" now may differ from what constituted negligence in pre-Reliable times.

A second category of cases included under the "major-minor" misnomer in Griffin are those in which slight fault is held to be non-contributing. Obviously, these are not really "major-minor" cases, as liability for a fault can only attach if the fault contributes to the collision.

The largest category of cases collected under the "major-minor" label are found under Griffin's heading "Doubt resolved in favor of minor offenders." This is an inaccuracy - perhaps it should read "... alleged minor offenders" - because the cases discussed are in fact cases in which, after examination of all the evidence, the courts have concluded that one vessel's faults are sufficient to

account for the collision, and therefore the court will resolve any reasonable doubts as to the conduct of the other vessel in her favor. In short, rather than there being a true "major-minor" situation, the courts apply a principle under which they simply find no fault on the part of one vessel.

An early and often quoted statement of the principle is found in The City of New York, 147 U.S. 72 (1893) in which the Supreme Court stated, at page 85:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

The good sense behind this principle is plain. In virtually every collision case some sort of criticism can be levied against a vessel not really in contributory fault - such as an anchored vessel - in the hope of sharing liability. If, after examining all of the evidence, it is clear that the obvious faults of one vessel entirely account for the collision, it is realistically sensible for the court to resolve any reasonable doubts with regard to the other vessel's conduct in her favor in order to achieve a just result. One danger stemming from Reliable is that it will encourage a vessel at fault and sustaining heavy damages (such as the PONCE DE LEON) to litigate against even an anchored vessel in the hope that,

if a small percentage of fault is attributed to the anchored vessel, this will greatly reduce - perhaps eliminate - the payment by the vessel grossly at fault.

In the cause at bar the District Court (wrongly lumping all three categories into "major-minor") misunderstood and erroneously refused to apply the doctrine of The City of New York, supra, and similar cases as urged by Getty Oil. It is clear that this error of law resulted in the WILMINGTON GETTY being condemned because the court, in refusing to apply these cases, said (JA 125), "Consequently, in light of Reliable, this court cannot excuse nor overlook the faults or omissions of the WILMINGTON GETTY."

The PONCE DE LEON's fault was established by uncontradicted testimony (much of it her own), and her faults fully accounted for the collision. Reasonably considered, the evidence at most gives rise only to doubt about the WILMINGTON GETTY's conduct. That doubt should have been resolved in her favor. As was said in The Oregon, supra, p. 42, at page 197:

> "... As we had occasion to remark in The City of New York, 147 U.S. 72, 85, where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter."

The PONCE DE LEON clearly did not carry her burden of proof under that principle, but the District Court's erroneous refusal to apply the principle resulted in the wrongful condemnation of the WILMINGTON GETTY.

THIRD POINT

ALTERNATIVELY, IF THERE WAS ANY FAULT ON THE WILMINGTON GETTY'S PART, WHICH IS DENIED, THE DISTRICT COURT ERRED AS A MATTER OF LAW IN IMPOSING AS MUCH AS 20% OF THE BLAME ON HER AND ONLY 80% OF THE BLAME ON THE PONCE DE LEON

This court has long held that conclusions of negligence are reviewable as a matter of law and not protected by the "clearly erroneous" test of F.R.C.P. 52(a). Mamiye v. Barber S.S. Lines Inc., 360 F.2d 774, 777-778 (2 Cir. 1966). The District Court's conclusions of law on the proportions of negligence (JA 126) are similarly reviewable as a matter of law. Here, even if it is considered that the WILMINGTON GETTY was contributorily liable, the apportionment of fault should be modified to favor the WILMINGTON GETTY more than 80%/20%. Such a modification of percentages is called for even under the District Court's present decision; but it is even more imperative if, as we contend, the number and gravity of the PONCE DE LEON's faults are greater than as perceived by the District Court and those of the WILMINGTON GETTY are less.

To our knowledge, this court has not yet reviewed, on appeal, any case involving a post-Reliable division of liabilities in proportion to fault. This may be the first opportunity for this court to express its views and provide guidance.

Here the District Court did not explain the basis for its 80%/20% division. The court does refer to two law review articles (JA 114-116) in both of which the authors in discussing abstract hypothetical situations use an 80%/20% apportionment. However,

that has no relevance in the cause at bar.

In considering apportioning liability, we respectfully suggest consideration of the principles developed in the decisions of the English courts, which have been dealing with proportionate fault since 1911. See, for example: The "Esso Brussels",[1972] 1 Lloyd's Rep. 286, reversed [1973] 2 Lloyd's Rep. 73, 80, 84, a collision in fog in which the trial court held the moving vessel 75% and the anchored vessel 25% at fault - modified by the Court of Appeal to hold sole fault on the part of the moving vessel; The "Statue of Liberty", [1971] 2 Lloyd's Law Rep. 277, 282, 284 (House of Lords), a collision in clear weather between two moving vessels in which the trial court assessed 70%/30%, the Court of Appeal modified to 85%/15% and the House of Lords affirmed 85%/15%; The "Salaverry", [1968] 1 Lloyd's Rep. 53, 62-63, a collision in fog involving two moving ships, fault apportioned 2/3-1/3, among many other cases.

The English courts generally make very detailed analyses of the facts (including consideration of time, speed and distance) and they determine which faults were most causative of the collision and which were most causative of the damage. They weigh the causative faults, comparing one ship to the other on each point. They assess the "causative potency" and "blameworthiness" of the respective faults and divide the liabilities in proportion to the "causative potency" and "blameworthiness". See The "Statue of Liberty", supra, at page 282. High degrees of blame are assessed in respect of (a) excessive speed; (b) moving vessels that fail

to plot and determine the course, speed and CPA of the other; (c) moving vessels that fail to avoid close quarters situations; and (d) vessels that fail to stop their headway if a close quarters situation is not avoided. The "Verena", [1961] 2 Lloyd's Law Rep. 127. On appeal, if there are errors of fact or law, the reviewing courts reassess the proportions of fault accordingly.

In several pre-Reliable cases, in which our courts were permitted to divide liabilities in proportion to fault under applicable foreign law, they have proceeded similarly to the English courts. See Partenreederei Wallschiff v. The Pioneer, 164 F. Supp. 421, 430 (E.D. Mich., S.D. 1958), aff'd 287 F.d 886 (6 Cir. 1961) and Labrador S.S. Co. v. M/V Egle, 1971 A.M.C. 2344 (N.D. Ohio 1971); both cases involved two moving ships; in both cases one vessel was held only 5% at fault for minor faults while the other vessels were each held 95% to blame for serious faults.

The lower courts have recently dealt with collisions, post-Reliable. See for example: Alamo Chem. Trans. v. Overseas Valdes, 398 F. Supp. 1094 (E.D. La. 1975), involving two moving ships in which the liabilities were assessed at 80%/20%. However, we find no post-Reliable decision describing in much detail the considerations involved in reaching apportionment.

When the actions of the two vessels are compared in terms of "causative potency" and "blameworthiness" clearly the blameworthiness of the PONCE DE LEON's conduct was immensely greater than the

WILMINGTON GETTY's, both as to the cause of the collision and the extent of the damage - particularly the great speed of the PONCE DE LEON which caused her to rake her after port side a long distance across the WILMINGTON GETTY's stem. We have referred the court to a number of decisions involving two moving ships in which the liabilities of the minor offender have been assessed between 5% and 20%. Ships underway at least have freedom to move to try to avoid collision. But to charge the anchored WILMINGTON GETTY with 20% liability gives excessive weight to her novel, questionable and minor faults (if they were causative faults at all) when compared with the faults of the grossly negligent PONCE DE LEON. Thus, even if this court does not correct the District Court's clearly erroneous findings of fact and erroneous conclusions of law as we have urged, it should still reassess the proportion of liabilities - on the order of 95%/5% in favor of the WILMINGTON GETTY. See Partenreederei Wallschiff v. The Pioneer, supra, p. 54.

A fortiori, if some of the errors below which we have asserted are corrected, this court should assess the WILMINGTON GETTY no more than 5% to blame and probably less.

If this court corrects all the District Court's errors, as we have urged, then of course the WILMINGTON GETTY should be exonerated and the PONCE DE LEON condemned in sole fault. Villain & Fassio E Compagnia v. T/S E. W. Sinclair, 313 F.2d 722 (2 Cir. 1963); Victorias Milling Co., Inc. v. The SS Gulfport, 166 F. Supp. 396

(S.D.N.Y. 1958); Union Oil Company of California v. The Tugboat San Jacinto, 409 U.S. 140, 146 (1972); and The "Esso Brussels", [1973] 2 Lloyd's Law Rep. 73 (Court of Appeal).

CONCLUSION

The judgment of the District Court should be reversed and the PONCE DE LEON and Sun/TTT adjudged solely liable for the collision and resulting damages. Alternatively, if there was any causative fault on the WILMINGTON GETTY's part (which is denied), the proportion of liability assessed against the WILMINGTON GETTY should be modified so as not to exceed five per cent. The cross-appeal should be dismissed.

Dated: January 21, 1977

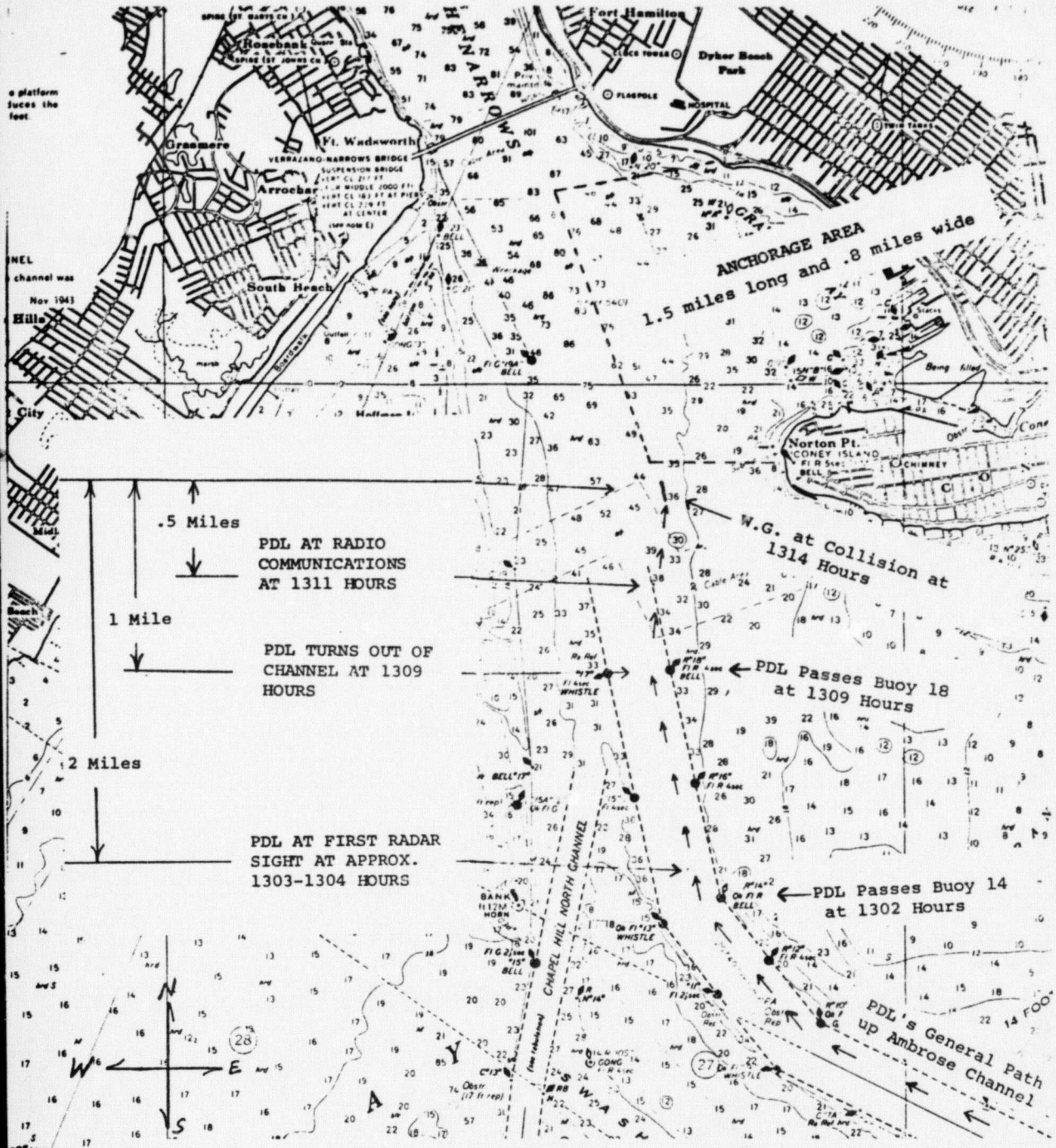
Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiff-Appellant and
Cross-Appellee Getty Oil Company (Easte
Operations), Inc.

Lawrence J. Bowles

Richard H. Brown, Jr.

Of Counsel



ANNEX I

(A Portion of Chart C & GS 369)

NOTE: The WILMINGTON GETTY (W.G.) is drawn approximately to scale in her position at anchor at the time of collision. Certainly the PONCE DE LEON (PDL) had ample room to go around her either left or right. If the PDL had simply stayed on course up the channel for a few more minutes, she would have passed the WG by at least 375 yards. NOTE also the size of the Anchorage Area which could be entered at any point.

ANNEX II

ANNEX TO THE RULES

RECOMMENDATIONS ON THE USE OF RADAR INFORMATION AS AN AID TO AVOIDING COLLISIONS AT SEA

(1) Assumptions made on scanty information may be dangerous and should be avoided.

(2) A vessel navigating with the aid of radar in restricted visibility must, in compliance with Rule 16(a), go at a moderate speed. Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. In this regard it must be recognized that small vessels, small icebergs and similar floating objects may not be detected by radar. Radar indications of one or more vessels in the vicinity may mean that "moderate speed" should be slower than a mariner without radar might consider moderate in the circumstances.

(3) When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under Rule 16(b) sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam.

(4) When action has been taken under Rule 16(c) to avoid a close quarters situation, it is essential to make sure that such action is having the desired effect. Alterations of course or speed or both are matters as to which the mariner must be guided by the circumstances of the case.

(5) Alteration of course alone may be the most effective action to avoid close quarters provided that:—

(a) There is sufficient sea room.

(b) It is made in good time.

(c) It is substantial. A succession of small alterations of course should be avoided.

(d) It does not result in a close quarters situation with other vessels.

(6) The direction of an alteration of course is a matter in which the mariner must be guided by the circumstances of the case. An alteration to starboard, particularly when vessels are approaching apparently on opposite or nearly opposite courses, is generally preferable to an alteration to port.

(7) An alteration of speed, either alone or in conjunction with an alteration of course, should be substantial. A number of small alterations of speed should be avoided.

(8) If a close quarters situation is imminent, the most prudent action may be to take all way off the vessel.

CERTIFICATE OF SERVICE

We hereby certify that two copies of the within Brief was this day served by mail on the following:

Dougherty, Ryan, Mahoney, Pellegrino & Giuffra
Attorneys for Defendants-Appellees
and Cross-Appellants
Sun Leasing Co., and Transamerican
Trailer Transport, Inc.
576 Fifth Avenue
New York, New York 10036

Dated: New York, N. Y.
January 21, 1977

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiff-Appellant-
Cross-Appellee

By: